Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CHRIS PARADISSIOTIS,

Petitioner,

v.

ROBERT E. RUBIN,
Secretary of the United States Department of Treasury;
R. RICHARD NEWCOMB,
Director of the Office of Foreign Assets Control,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Office of Foreign Assets Control's placement of Petitioner on the list of Specially Designated Nationals, thereby causing the blocking and destruction of Petitioner's personal property and subjecting his ordinary legal affairs to potential criminal sanctions, constitutes a Bill of Attainder in violation of the United States Constitution.

Whether the Libyan Sanction Regulations, 31 C.F.R. § 550.001, *et seq.*, as promulgated or as applied by the Office of Foreign Assets Control unconstitutionally interfere with Petitioner's constitutional right of access-to-counsel.

Whether an Executive agency's construction of a statute or interpretation of its promulgated regulations, which broadly construes or ignores words of limitation, is entitled to any deference under the varying standards of *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82 (1984) (interpretation must not be "unreasonable"), section 706(2)(A) of the Administrate Procedure Act (interpretation cannot be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law), or *Consarc Corp. v. United States Treasury, OFAC*, 71 F.3d 909, 915 (1995) (interpretation cannot be "plainly inconsistent"), when the agency's interpretation raises difficult constitutional questions.

Whether the Office of Foreign Assets Control's interpretation of its authority under The International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701, *et seq.*, and Executive Order 12544 violates the non-delegation doctrine to the extent that the agency construes its authority to permit, without due process or judicial review of wrongful conduct, the blocking of personal property of foreign citizens who may transact business legally with companies deemed to be controlled by a country targeted for economic sanctions.

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Petitioner, Chris Paradissiotis, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Paradissiotis v. Rubin*, 171 F.3d 983 (5th Cir. 1999), and is set forth in Appendix ("App.") A hereto at 1a-11a. The opinions of the United States District Court for the Southern District of Texas, affirmed by the Fifth Circuit, have not been reported. The opinions are set forth in their entirety in Appendix B and C hereto at 12a-83a.

STATEMENT OF JURISDICTION

The Fifth Circuit issued its decision on April 1, 1999. This Petition for a Writ of Certiorari is filed within ninety days of this date.

Jurisdiction in this Court is conferred by 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Petition includes the following constitutional and statutory provisions[1]:

- The International Emergency Economic Powers Act (hereafter "IEEPA"), 50 U.S.C. § 1701, *et seq.*
- Executive Order 12543 (51 Fed. Reg. 875) (1986);
- Executive Order 12544 (51 Fed. Reg. 1236) (1986);

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1. Pertinent portions of some of these materials are printed in the Appendix.

- The Libyan Sanction Regulations (hereafter the "LSRs"), 31 C.F.R. § 550, *et seq.*;
- The Bill of Attainder Clause of the United States Constitution, Const. Art. 1, § 9, cl. 3;
- The First Amendment of the United States Constitution;
- The Fifth Amendment to the United States Constitution;
- The Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Summary of Proceedings Below

This Petition arises from a decision by the United States District Court for the Southern District of Texas granting Respondents' Motion to Dismiss or in the Alternative for Summary Judgment and denying Mr. Paradissiotis' Motions for Preliminary Injunction and to Allow Discovery. Judge Rosenthal's decision was filed on March 17, 1997, and subsequently reaffirmed by an opinion entered on August 19, 1997, denying Petitioner's Motion to Vacate the Court's March 17 Order. The Fifth Circuit affirmed this decision on April 1, 1999. Pertinent to this Petition, the Fifth Circuit adopted Respondents' position that its construction of empowering statutes and its interpretation of its regulations were entitled to extreme deference, and that Mr. Paradissiotis had not suffered any constitutional injury based upon Respondents' interpretation.

B. Factual Background

The International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701, *et seq.*, authorizes the Executive powers to impose economic sanctions to prohibit and regulate transactions with and property of "*any foreign country or a national thereof*," 50 U.S.C. § 1702(a)(1)(B), and such powers "may *only* be exercised to deal with an unusual and extraordinary threat" to the security or foreign policy of the United States and "may not be exercised for any other purpose." 50 U.S.C. § 1701(b). Pursuant to the IEEPA and in order to punish Libyan support for international terrorism, President Reagan issued two Executive Orders to issue blocking orders, to prohibit United States persons from certain conduct with respect to the Government of Libya, and to authorize the Secretary of Treasury "in consultation with the Secretary of State, to take such actions, including the promulgation of rules and regulations, as may be necessary to carry out the purposes of this Order." Exec. Order 12543. The Secretary of Treasury apparently delegated this authority to the Office of Foreign Assets Control ("OFAC"). On January 16, 1986, OFAC issued Libyan Sanction Regulations ("LSRs") to implement the Executive Orders. 31 C.F.R. § 550, *et seq.*

The pertinent parts of the LSRs as promulgated: (i) prohibit United States persons from performing contracts in Libya, 31 C.F.R. § 550.202; (ii) prohibit United States persons from engaging in transactions with the Government of Libya, or with property in which the Government of Libya has had an interest since 1986, 31 C.F.R. §§ 550.201, 550.203-205, 550.422; and (iii) require United States persons to block all transfers of property in which the Government of Libya has an interest. 31 C.F.R. § 550.209. A license from OFAC is required to proceed with actions prohibited. *See* 31 C.F.R. § 550.517. The LSRs define the "Government of Libya" to include:

> (1) The state and Government of Libya, as well as any political subdivision, agency, or instrumentality thereof, including the Central Bank of Libya;
>
> (2) Any partnership, association, corporation, or other organization owned or controlled directly or indirectly by the foregoing;
>
> (3) Any person *to the extent that such person is*, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since the effective date, *acting or purporting to act directly or indirectly on behalf of any of the foregoing*;
>
> (4) any other person or organization determined by the Secretary of the Treasury to be included within this section.

31 C.F.R. § 550.304 (emphasis supplied). The LSRs also define "Libyan Person:"

> The term "Libyan Person" means any Libyan citizen, any juridical person organized under the laws of Libya, or any juridical person owned or controlled, directly or indirectly, by a Libyan citizen or the Government of Libya.

31 C.F.R. § 550.305. Significant to this Petition is what the LSRs do **not** do:

- The LSRs do not prohibit United States persons from transacting business with, nor do they require blocking property of, any Libyan Person, except such persons also defined as the "Government of Libya";

- The LSRs do not prohibit United States persons from engaging in business transactions with, or require blocking property of, persons not owned or controlled by the Government of Libya (such as companies or partnerships in which the Government of Libya owns a minority interest or lacks control);

- The LSRs do not prohibit any foreign persons, including foreign subsidiaries of United States corporations, from engaging in business with the Government of Libya;

- **The LSRs do not prohibit United States persons from engaging in transactions with, nor require blocking property of, foreign persons who legally engage in business with the Government of Libya**.

On January 7th and 8th, 1986, when President Reagan declared a national emergency under the IEEPA, Mr. Paradissiotis, a citizen of Cyprus domiciled in London, had been working for several years as an accountant and then executive manager of Holborn Oil Trading Limited ("HOTL"), a downstream and offshore subsidiary of The Coastal Corporation ("Coastal"), a Delaware corporation engaged in the energy business. HOTL had been involved in complex business interests with companies in which the GOL had an interest. Pursuant to his employment with HOTL and Coastal, Coastal awarded Mr. Paradissiotis options in 2,250 shares in Coastal common stock *prior* to the issuance of the 1986 Executive Orders. The options had an expiration date of March 19, 1997. Mr. Paradissiotis also had purchased and owns stock in Coastal.

After 1986, OFAC issued from time-to-time a list of "Specifically Designated Nationals," or "SDNs" in the Federal Register that identified numerous corporations and entities that were owned or controlled by the Government of

Libya ("SDN List"). On August 5, 1991, OFAC first listed individuals (including Petitioner), as SDNs, naming 21 individuals to the SDN List as "individuals whom the Director of [OFAC] has determined to be acting or purporting to act directly or indirectly on behalf of the Government of Libya." 56 Fed. Reg. 37156 (Aug. 5, 1991). In that publication, OFAC also listed as SDNs two foreign corporations that are minority owned by HOTL and in which Mr. Paradissiotis serves as an officer. The term "Specially Designated National" was not added to the LSRs until March 10, 1993, some 18 months after Mr. Paradissiotis was named as a SDN. 58 Fed. Reg. 13198 (March 10, 1993). Before and after 1991, OFAC did not challenge that the conduct of Petitioner was not prohibited by the LSRs; stated simply, Petitioner has *never* engaged in any illegal conduct prohibited by the LSRs.

After meetings and correspondence with OFAC, Coastal learned that OFAC interpreted the SDN List as causing each listed individual to be the Government of Libya for purposes of the LSRs. From January 1993 through December 1996, Petitioner applied repeatedly to OFAC for licenses so that he could sell his personal stock and exercise his Coastal stock options, receive medical treatment in the United States, and consult United States legal counsel. All of these license requests were either unanswered or denied. In one reply to a license request, the Director of OFAC explained "because Mr. Paradissiotis was determined to be an SDN, all financial dealings with him were deemed to be dealings with the Government of Libya." Petitioner also requested from OFAC the publication of standards for being named to or removed from the SDN List, which was similarly denied. In a 1995 denial of one of Petitioner's requests for a license to exercise his stock options and sell his stock, OFAC suggested that Mr. Paradissiotis should apply for a license to exercise the transfer and place the proceeds into a blocked account. During the pendency of this case, Petitioner applied for such

a license to prevent the expiration of the options. OFAC denied that license request.

OFAC interpreted its LSRs to deny Petitioner, as an SDN, legal representation by United States counsel without a license, except to provide advice for complying with the LSRs. A license was required before United States lawyers could be paid or provide counsel for any other reason. OFAC licensed Petitioner to pay United States legal counsel to pursue this challenge to the application of the LSRs, OFAC denied his license requests made through 1996 for access to United States counsel for his business dealings as an HOTL corporate officer engaged in international transactions and for personal purposes. On March 10, 1993, OFAC reinterpreted its regulations and accordingly amended them to expressly prohibit legal representation with respect to "contract performance" or "business dealings" and any legal service that would "benefit" an SDN and any legal services rendered "on behalf of . . . or with respect to property interests of the Government of Libya." 31 C.F.R. §§ 550.422, 550.517. This amendment was added after a court prohibited OFAC from seizing HOTL privileged documents and ruled that providing legal services to HOTL and Mr. Paradissiotis was not prohibited by the LSRs, as OFAC had interpreted. *Looper v. Morgan*, C.A. No. H-92-0294, slip opinion at 27-28 (S.D. Tx. June 30, 1995).

Following these denials and refusals, Petitioner filed suit seeking declaratory relief. Petitioner also sought to take discovery for numerous evidentiary reasons, including: (i) to prove his qualification for the safe harbor of 50 U.S.C. § 1702(a)(3); (ii) to establish that there was no advance publication of the OFAC application of the SDN List; and (iii) to illustrate the arbitrary and capricious nature in which OFAC selectively interprets and enforces its regulations. Petitioner's motions were denied, and the District Court granted OFAC's Motion for Summary Judgment in its

entirety. The Fifth Circuit affirmed the District Court's decision, except for one portion relating to Petitioner's Fifth Amendment takings argument. This portion of the District Court's opinion was vacated for lack of jurisdiction, as the Fifth Circuit held that the United States Court of Claims had exclusive jurisdiction over this portion of the controversy.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE FIFTH CIRCUIT PURPORTED TO DECIDE AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT: WHETHER THE SDN LIST, AS TO INDIVIDUALS, CONSTITUTES A BILL OF ATTAINDER.

The Petition should be granted as a matter of constitutional first impression. OFAC issues a new bill of attainder with every new individual's name that it publishes in the Federal Register to the SDN List. OFAC's dramatically increasing use of the SDN List makes its application an important issue that should compel this Court to settle whether this federal law as applied to Petitioner is in violation of the ban against bills of attainder and whether procedural safeguards and standards should apply to restrict OFAC's use of discretionary power.[2] The court below would not

2. The Director of OFAC in the record admits: "the use of the SDN List has become an increasing tool in the arsenal against terrorism." Shrouding the policy issue with inflammatory tags should not obviate the need for Supreme Court review. "[T]he attainder ban cannot be rendered inapplicable simply because a law designating an identifiable class of individuals for punishment might be recharacterized as a prophylactic measure enacted to serve some legitimate end." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-6, 644 (2d ed. 1988). The executive (Cont'd)

challenge the blacklisting power, exercised by the Executive with unbridled discretion, in selectively naming individuals — foreign citizens not nationals of Libya — to the SDN List. Unless this Court prohibits this practice or expresses guidance on the standards, if any, that must be followed, OFAC can increasingly use the SDN List against foreign individuals as a tool to coerce its policy when neither Congress nor the Executive Branch ("Executive") can muster the support to declare in advance the conduct to be punishable.

Naming Mr. Paradissiotis as an SDN had the immediate and inescapable effect, without a trial or even appellate review, of criminalizing his future acts due to his prior legal conduct, blocking all of his property and property rights with a United States nexus, and destroying his terminable contract rights that had no nexus to the target country of Libya. This was done despite the fact that Petitioner was and is in compliance with the LSRs and has not been accused of any wrongful conduct.

If an Executive agency were to assume the power to list United States citizens who are engaged in *lawful* conduct, although in opposition to an Executive *policy*, with the result that the bank accounts and private property of the individual were thereafter frozen for an indefinite period, the action certainly would comprise an unconstitutional bill of attainder. Therefore, the only rule of law that the court below effectively decided is that the President's foreign policy powers override the ban against bills of attainder.

The court below asserted three bases for refusing bill of attainder treatment. First, the Fifth Circuit correctly noted

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(Cont'd)
branch is prohibited from promulgating regulations which inflict injury on a particular person without affording the procedural safeguards of a judicial trial. *Id.* at 657.

that "no circuit court has yet held" that the regulations of an Executive agency are legislative acts. [App. A at 9a]. A concurring opinion from this Court, however, states that the ban against bills of attainder also applies to the Executive: "I cannot believe that the authors of the Constitution, who outlawed the bill of attainder, inadvertently endowed the executive with power to engage in the same tyrannical practices that had made the bill such an odious institution." *Joint Anti-Fascist Refugee Comm'n v. McGrath*, 341 U.S. 123, 144, 71 S. Ct. 624, 634 (1950); *accord Rodriguez v. United States Parol Comm'n*, 594 F.2d 170, 173-74 (7th Cir. 1979); 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 3.2 (2nd Edition 1978).[3]

Secondly, the court below questioned any applicability of the ban to foreign persons. To the extent the Fifth Circuit intimated that the attainder ban does not apply to foreign persons, its opinion conflicts with judicial review rendered in a prior opinion of this Court. *Fleming v. Nestor*, 363 U.S. 603, 80 S. Ct. 1367 (1960) (denial of social security benefits to foreign aliens, members of the communist party, is a reduced government benefit and not punishment); *accord Mendelsohn v. Meese*, 695 F. Supp. 1474, 1478, 1488 n.24 (S.D.N.Y. 1988) (the ban applies to non-citizens, but the PLO is a corporation).

Thirdly, the court below ruled that the "mere publication of his name in the list did not evince an 'intent to punish' . . . [and] no concomitant burden was imposed based solely on his inclusion in the SDN list." [App. A at 10a]. Both of these statements are belied by the unopposed record and

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3. The IEEPA was a congressional attempt to limit the Executive's power to declare a national emergency in times of peace. *See Dames & Moore v. Regan*, 453 U.S. 654, 101 S. Ct. 2972 (1981); Note, the INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: A CONGRESSIONAL ATTEMPT TO CONTROL PRESIDENTIAL EMERGENCY POWER, 96 Harv. L. Rev. 1102 (1983).

substantial common law authority.[4] This conclusion is reached by the Fifth Circuit in the context of foreign policy delegation. The court below granted deference to OFAC's construction of the IEEPA and interpretation of the LSRs, which effected an assertion of complete Executive power over the property and actions of any foreign individuals who act for a company OFAC deems to be controlled by the Government of Libya.

Thus, the opinion below departed from opinions of this Court in all three separate areas, each of which provides an independent basis for granting the Petition. Moreover, the court below accepted OFAC's justification for the SDN List. [App. A at 6a]. However, the pronouncement of a broad governmental purpose is not sufficient in bill of attainder cases to negate the existence of punishment. Instead, existing judicially recognized purposes should establish the standard, and there must be "an adequate nexus between the restriction imposed and the legitimate governmental purpose." *Dehainaut v. Pena*, 32 F.3d 1066, 1072 (7th Cir. 1994).

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4. With respect to intent to punish, the Director of OFAC in the record states that if the personal financial transactions of SDNs were authorized, "the United States Government would lose all leverage and flexibility in *deterring* SDNs from advancing the goals of the GOL." The Supreme Court rejected a similar government defense that a law is not a bill of attainder if the purpose is preventive rather than retributive, stating: "Punishment serves several purposes; retributive, rehabilitative, deterrent and preventive." *United States v. Brown*, 381 U.S. 437, 458, 85 S. Ct. 1707, 1720 (1965) "[T]he incapacity of political bodies . . . [is] at its peak when they seek to decide which specific individuals deserve to be deprived of some opportunity." TRIBE, *supra* at 658 n.8.

The actual punishment here, the types and substance of which were supported by case law to both lower courts, is apparent; OFAC even refused to allow Petitioner to exercise the options and place the proceeds in a blocked account, resulting in a complete loss of the property.

Blocking personal property was one of the types of punishment. The opinion of the court below ignores the cited common law recognizing permissible purposes for upholding blocking orders: (i) "preserving the assets involved for possible use in some satisfaction of American claims against the country involved," *Nielsen v. Secretary of Treasury*, 424 F.2d 833, 840 (D.C. Cir. 1970); (ii) using the blocked funds "as a 'bargaining chip' to be used by the President when dealing with a hostile country," *Dames & Moore v. Regan*, 453 U.S. 654, 673, 101 S. Ct. 2972, 2983 (1981); and (iii) depriving the target government of the benefit of its property, *Propper v. Clark*, 337 U.S. 472, 493, 69 S. Ct. 1333, 1345 (1949).

Interpreting the LSRs to permit the blocking of Petitioner's retirement funds and even the intentional destruction of his personal stock options does not satisfy these purposes. Instead, the court below accepted the purpose as stated by the Director of OFAC: "Its purpose is to cast the widest possible net over individuals who are or have been or are suspected of being actors directly or indirectly on behalf of the Government of Libya." [App. A at 6a]. The court below then endorsed OFAC's interpretation to permit bills of attainder to seize assets against "any person who has acted," and explained that it was "[g]ranting OFAC the extent of deference that is due. . . ." *Id.*

Case review of similar applications — naming people to "blacklists" because of their unpopular political beliefs and immediately denying them access to their personal property — appear rarely in judicial analysis. The government explained such infrequency as being due to demanding elements needed to establish a bill of attainder; instead, bill of attainder cases are rare because Congress would never conceive of creating such a "blacklist." For example, Congress knows to avoid such a situation, as it sought a constitutionally sound method for sanctioning

terrorist organizations in the only legislation similar to the LSRs, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[5]

To the contrary, OFAC legislates at will a new economic sanction with each SDN named as the Government of Libya, effecting a bootstrap application to all dealings of the individual as if the Executive Orders specifically named him. This is achieved by an arbitrary process, using expansive interpretations of the IEEPA and its own LSRs, without judicial review.

This Court should determine whether the constitutional ban against bills of attainder prohibits such action as to individuals. This Court should settle whether safeguards or standards should be imposed against which OFAC's licensing process and SDN designation could be measured, or this Court should establish intelligible principles for how OFAC may publish and apply such a list. The safeguard embedded in the ban on bills of attainder is judicial review. Due process

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5. 8 U.S.C. § 1189. Under the AEDPA, Congress authorized the Secretary of State to designate a "foreign terrorist organization;" provided the Secretary creates an administrative record with enumerated conditions and gives seven days advanced notice of the intended designation to Congress. *Id.* § 1189(a)(2)(A). AEDPA authorizes to block assets of the designated foreign terrorist organization, but that authority *does not extend to the assets of individual* members of the foreign terrorist organization. *Id.* § 1189(a)(2)(C). A designation under AEDPA is effective for a period of two years and may be redesignated for only an additional two years. *Id.* § 1189(a)(4). The designated organization is afforded the right to seek judicial review of the designation. *Id.* § 1189(b)(1). To the contrary, OFAC maintains that it has the unfettered right to designate and punish Petitioner as an SDN indefinitely and that Petitioner has no judicial recourse to determine the merits of his continued designation, to enjoy his personal property or conduct personal business, or even to seek legal counsel.

should require standards for promulgating "blacklists" at an Executive agency level with such serious property and liberty effects.

II.

THE DECISION OF THE FIFTH CIRCUIT PASSED ON AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT: WHAT STANDARDS SHOULD APPLY TO AN EXECUTIVE AGENCY'S LICENSING SCHEMES THAT ESTABLISH PRIOR RESTRAINTS ON ACCESS TO LEGAL COUNSEL.

After OFAC defined Mr. Paradissiotis as the Government of Libya for all purposes, OFAC interpreted its LSRs as denying an SDN access to counsel without a license. Petitioner's lawsuit alleged that OFAC's regulations and arbitrary licensing process prevented him from accessing legal counsel in violation of his constitutional rights. The District Court found that Petitioner lacked standing, and the Fifth Circuit affirmed this decision with:

> Third, although Paradissiotis persists in contesting OFAC's regulations requiring the issuance of a license before a SDN may retain legal counsel, he lacks standing. OFAC granted his only request for a license to obtain counsel, and Paradissiotis has not shown that he will be deprived of legal services in the future based on the regulations. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992).

[App. A at 10a-11a].[6]

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6. The Fifth Circuit was simply wrong in its belief that OFAC had granted Petitioner's "only request," borrowed from the District Court's Order, but this factual error is irrelevant. OFAC only granted (Cont'd)

The Fifth Circuit's opinion as it relates to standing failed to recognize that Petitioner's situation is capable of repetition, yet evading review, and hence falls squarely within the holding of *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S. Ct. 1181, 1183 (1982) (per curiam). OFAC approves and denies license applications with no time limits and no published guidelines. Petitioner undoubtedly will need timely United States legal counsel in the future for international transactions in which his company is involved, and he will suffer the same impediments to access of legal counsel. Petitioner also meets the criteria for a facial challenge of this interpretation had he not had license applications denied. Petitioner has standing to pursue this matter before this Court, and to the extent the Fifth Circuit's opinion on standing conflicts with numerous opinions of this Court, as well as the various Courts of Appeals, it further provides an independent basis to grant the Petition under Sup. Ct. R. 10.

Petitioner's argument below presented four discrete constitutional justifications for determining that OFAC cannot deny him access to counsel: (i) the LSR's interfere with Petitioner's right to "Petition the Government for a redress of grievances" (First Amendment); (ii) the LSRs permitted OFAC to selectively delay or disqualify Petitioner's counsel (Sixth Amendment); (iii) the licensing process requires forced disclosure of contemplated and past conduct as prerequisites for receiving a license (Fifth Amendment);

(Cont'd)

a license for payment of United States counsel to prosecute this action. OFAC acknowledges in the record that Petitioner made several license requests for authority to consult United States legal counsel in connection with transactions in which he was involved personally and in his corporate capacity as a HOTL officer. OFAC denied the license requests, demanding specific disclosures of the transactions and advice requested before reconsideration. This arbitrary and lengthy procedure extends far beyond the ordinary time constraints for business transactions.

and (iv) disclosure to OFAC in the license process prevents candor and full disclosure between Petitioner and his chosen attorney (limiting the attorney-client privilege).

Petitioner's contention that he is entitled to protection of these four constitutional rights finds support in the decisions of this Court as well as the Courts of Appeals.[7] Petitioner cited authorities to the courts below to establish that even as a foreign person, he is entitled to these constitutional protections because there is a sufficient nexus.[8]

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7. *See Glasser v. United States*, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."). This Court has recognized that even sophisticated foreign clients, who "constantly go to lawyers to find out how to obey the law," should have unimpeded access to counsel faced with the complexity of regulatory schemes. *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981) (recognizing attorney-client privilege for foreign companies); *see also Civil Aeronautics Bd. v. Air Transp. Ass'n. of Am.*, 201 F. Supp. 317, 318 (D.D.C. 1961) (stating "[i]n order to abrogate [the attorney-client privilege] in whole or in part as to any proceeding whatsoever, affirmative legislative action would be required that is free from ambiguity."); *United States v. Harvey*, 814 F.2d 905, 925 (4th Cir. 1987) (holding applications of the law which effectively deprive the ability to retain private counsel on any basis other than sham and fraud participated by counsel involve arbitrary action by government against which the Sixth Amendment provides protection.).

8. *E.g., In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994) (applying privilege in LSR case to a foreign company). The only "access to counsel" case cited by Respondent was *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412 (11th Cir.), *cert. denied*, 516 U.S. 913 (1995). That Court refused detained Haitians access to counsel where their only nexus to the United States was their situs on a naval base in Cuba, because the consultation was requested solely to "engag[e] litigation as a form of political expression" with no showing of "an underlying legal claim." 43 F.3d at 1429.

There is no doubt but that OFAC's decision to list Petitioner as an SDN drastically interferes with Petitioner's right of access-to-counsel. OFAC asserted that its foreign policy power exercised through the LSRs permitted OFAC to abrogate Petitioner's right of access-to-counsel. OFAC further asserted that its licensing mechanism is an adequate review process for permitting access-to-counsel. To the courts below, OFAC asserted that its decision to grant or deny and revoke licenses is wholly within its discretion, not subject to appeal, and not governed by any known "judicially manageable standards," citing *Heckler v. Chaney*, 470 U.S. at 828-30, 105 S. Ct. 1654-55 (1985) (holding that Administrative Procedures Act does not require review where agency is delegated discretion with no standards). OFAC can (and did on one license application from Petitioner and one from Coastal) sit on a license request indefinitely and refuse to answer it, leaving the applicant with absolutely no recourse. Thus, it is undisputed that Petitioner's constitutional right of access-to-counsel is left to the unbridled discretion of an unknown, unnamed OFAC functionary.

In a factual context that is remarkably similar to this instant case, the Ninth Circuit in *Bernstein v. United States Department of Justice*, No. 97-16686, 1999 WL 274111 (9th Cir. May 6, 1999), applied *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759, 108 S. Ct. 2138, 2146-52 (1988) and determined that part of the State Department's Export Administration Regulations ("EARs") were facially invalid as a prior restraint against the First Amendment. *Bernstein*, at *9. The similarities between the EARs and the LSRs are significant:

- Both find their underpinnings in the executive's national security and foreign policy powers;

- Both require license applications be submitted to executive agencies before certain actions may be taken;

- Both leave the decision as to whether to grant the license within the unbridled discretion of an agency, and place no constraints on the agency in approving or denying the license;

- Both impose no time limits on the agency's decision to approve or deny the license;

- Neither grant a denied applicant any recourse to determine why the license is denied.

See Bernstein, at *3, *affirming Bernstein v. United States Dep't of State*, 945 F. Supp. 1279, 1289-90 (N.D. Cal. 1996). In essence, both regulatory schemes are "paradigms of standardless discretion." *Id. Bernstein* had little trouble determining that the licensing process of the EARs was an unconstitutional prior restraint of First Amendment rights under *Lakewood* and could not be applied to prevent Bernstein's publishing of his encryption software. *Id.* at *11.

Petitioner recognizes that *Bernstein* was applying "prior restraint" standards previously espoused by this Court in the free speech context of *Lakewood.* Nevertheless, the right of access-to-counsel is a similarly protected, similarly founded fundamental constitutional right. *Bernstein* recognized that the standardless discretion of the EARs licensing scheme also implicated other constitutional protections, including the Fourth Amendment (right to privacy), the right against compelled speech, and the right to information privacy. *Id.* at *9. While leaving these constitutional questions for another day, *Bernstein* noted that the EARs not only effected "scientists laboring in an esoteric field, but also touches on the public interest broadly defined." *Id.* Similarly, OFAC's

promulgation of the LSRs and its licensing scheme as applied touches on the public interest and constitutional guarantees (First, Fifth and Sixth Amendment) relating to access of counsel.

The District of Columbia Circuit has previously rejected OFAC's interpretation of its regulations to require a license before a Cuban SDN could form an attorney-client relationship. *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 874 (D.C. Cir. 1984). *American Airways* explained: "When we add to our consideration the constitutional dimension plaintiff's access-to-counsel plea entails, we find the case against OFAC's position overwhelming." *Id.* at 873-74. In the ensuing fifteen years since *American Airways*, OFAC has worded its LSRs more cleverly but continues to regulate SDNs' access-to-counsel "bounded by no standards that have been presented to us." *Id.*

Where *Bernstein* and *American Airways* recognized the impropriety of regulatory impediments to constitutional rights, *Amusement Devices Ass'n. v. State of Ohio,* 443 F. Supp. 1040 (S.D. Ohio 1977), overturned a similar statutory scheme that interfered with access-to-counsel. In *Amusement Devices*, the Court confronted an Ohio statute that stated:

> No person, with purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall . . . furnish legal, accounting, or other managerial services to a criminal syndicate.

Id. at 1049. Finding the right of access-to-counsel had First, Sixth, and Fourteenth Amendment implications, the court entered a declaratory judgment striking down that part of the statute. The *Amusement Devices* court reasoned:

> [i]t is fundamentally unfair for a state on the one hand to regulate with criminal sanctions certain

> modes of conduct, and on the other hand to enact a penal statute which, because of its breadth and its lack of definition, discourages the rendering of legal services to persons in the regulated field.

Id. at 1053. Here, OFAC's designation of Petitioner as a SDN places him within the regulated field and indisputably discourages and limits his ability to retain and consult United States legal counsel. The LSRs impose a prior restraint on access-to-counsel without standards. The LSRs contain absolutely no constraints on OFAC's discretion to grant or deny a license, resulting in a violation of Petitioner's First, Fifth and Sixth Amendment rights and his attorney-client privileges.

Absent guidelines and constraints, OFAC will continue to infringe upon the four underpinnings of Petitioner's constitutional rights and the rights of others similarly situated. It is the province of this Court to either declare the offending provisions of the LSRs unconstitutional, or to give guidance for a proper construction of OFAC's delegated authority that protect Petitioner's constitutional rights. The Fifth Circuit passed on this difficult issue in its erroneous decision that Petitioner lacked standing. This Court and the circuits have affirmed the importance of the constitutional right of access-to-counsel. Petitioner is asking for standards, similar to the requirements of *Lakewood*, to limit or measure acceptable agency prior restraint. This important issue of federal law is one of first impression, and has not, but should be, decided by this Court.

III.

THE DECISION OF THE FIFTH CIRCUIT CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND THE NINTH CIRCUIT THAT STATE AN AGENCY'S INTERPRETATION IS ACCORDED NO DEFERENCE WHEN ITS INTERPRETATION RAISES SERIOUS CONSTITUTIONAL ISSUES.

This Petition implicates OFAC's construction of its delegated authority in the IEEPA, OFAC's interpretation of the meaning of 31 C.F.R. § 550.304(c), and OFAC's application of its promulgated SDN List, all as they relate to Petitioner. The court below applied a standard of extreme deference to the agency interpretation, accepting OFAC's interpretation since it was not plainly inconsistent with the language. There is a conflict between the circuits as to the proper deference to be afforded the agency interpretation, which Petitioner requests that the Supreme Court resolve.

Petitioner asked the court below to construe the language's natural and plain meaning, consistent with the judicially recognized purposes of blocking orders. Furthermore, Petitioner's position is that OFAC's interpretation is overly broad and ignores the limiting "to the extent" language in the LSRs. Moreover, Petitioner contends that a proper construction of the IEEPA would not permit the LSRs to sanction the personal property and non-Libyan related business of individuals who are not Libyan nationals. Petitioner read his designation to the SDN List as constructive notice; *i.e.*, the LSRs impose restraints on United States persons, and LSRs penalties are assessed on *mens rea* requirements, so the burden should rest with the United States person dealing with Petitioner to determine if the SDN is acting in the transaction in a capacity on behalf of or to benefit the Government of Libya. Petitioner's interpretation was rejected by OFAC in its several license denials, the

district court in its Order and Reasons, and the Fifth Circuit. It is undisputed that but for the application of OFAC's interpretation, Petitioner's personal property could not be blocked and he would not be subject to the various punitive measures contained within the LSRs.

Pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984) and *Consarc Corp. v. United States Treasury Dept., Office of Foreign Assets Control*, 71 F.3d 909, 914 (D.C. Cir. 1995), the Fifth Circuit held that OFAC's interpretation was not unreasonable (applying the *Chevron* standard) nor was it plainly inconsistent with the regulation (applying the *Consarc* standard). [App. A at 6a].

The Fifth Circuit permitted OFAC to construe the IEEPA as authorizing discretionary blocking against nationals of any country instead of the targeted Libya "and nationals thereof." Thus, the Fifth Circuit adopted "OFAC's interpretation of the language to broadly cover 'any person' who has acted or purported to act on behalf of the government of Libya. . . ." [App. A at 6a-7a]. The result is to empower OFAC to make the SDN, rather than the Government of Libya, the target of the sanctions and block his personal property. Under OFAC's interpretation, the economic sanctions apply to Petitioner and his personal property for all business affairs and not only "to the extent" he acts for the Government of Libya or an SDN company. The Fifth Circuit also adopted OFAC's argument that the "to the extent" language, because it was contained in the definitional section of the LSRs and not again contained in the prohibition section, would not apply to the instant case. To say that the definitional section of a regulation does not apply to the entire regulation underscores the effort the Fifth Circuit made to adopt OFAC's strained interpretation of the LSRs. When construing a regulatory scheme, the court should give effect to the entire regulation, and not read certain parts in isolation.

Hilton v. Southwestern Bell Tel. Co., 936 F.2d 823, 828 (5th Cir. 1991). As explained in Issue I, *supra*, for other purposes, the court below accepted OFAC's broad "widest possible net" purpose for blocking Petitioner's property rather than analyzing the inconsistency with judicially recognized purposes, which are restrictive.

In its analysis of the LSR at issue here, the Fifth Circuit adopted a dual-test of both *Chevron* and *Consarc*. *Chevron*, which apparently applies to agency interpretations of statutes, requires that the agency interpretation not be "unreasonable." *Chevron*, 467 U.S. at 843-44, 104 S. Ct. at 2781-83.[9] *Consarc*, which apparently applies to agency interpretation to regulations promulgated pursuant to the agency's rulemaking authority, requires that the agency interpretation not be "plainly inconsistent" with the regulation. *Consarc*, 71 F.3d at 915. Although this case would appear to be a candidate for guidance under the Administrative Practices Act ("APA"), the Fifth Circuit instead chose to use *Consarc* and *Chevron*, although those deference standards apply to different interpretation scenarios. The agency interpretations in question in *Chevron* and *Consarc* did not pose potential constitutional problems.

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9. *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 118 S. Ct. 927 (1998), which states: "If we determine that Congress has not directly spoken to the precise question at issue, we then inquire whether the agency's interpretation is reasonable." *Id.* at 939. Although *National Credit Union* may have narrowed *Chevron* by saying that the agency's interpretation must be reasonable, rather than "not unreasonable" the interpretation in question in *National Credit Union*, as in *Chevron*, was not one that violated constitutional claims. *Id.* at 938-39.

The Fifth Circuit's decision is squarely in conflict with the Ninth Circuit as well as decisions from this Court. In *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), the Ninth Circuit confronted the issue of "[t]o what extent is a court bound to defer to an agency's interpretation where that interpretation raises difficult constitutional questions?" *Id.* at 661. Guided by *DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 108 S. Ct. 1392 (1988) and *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759 (1991), the *Williams* court concluded that if the alternative interpretation raised "serious constitutional questions," the agency's interpretation is accorded no deference under *Chevron*. *Id.* at 662. The *Williams* court resolved the issue by interpreting the statutory clause in such a manner as to avoid confronting the difficult constitutional issues, consistent with this Court's holding in *DeBartolo Corp. Id.* at 666.

Williams rationale is supported by underpinnings of the *Chevron* decision. *Chevron*, which apparently eschewed the APA in favor of a common-law approach to agency interpretation, found that deference to agency interpretation was warranted: (i) because Congress had delegated interpretative authority to the agency; and (ii) because the agency has superior expertise in the particularly area of its interpretation. *Chevron*, 467 U.S. at 843, 844, 104 S. Ct. at 2782. The balance of expertise envisioned in *Chevron* necessarily shifts from the agency to the courts when a constitutional line is about to be crossed. *Williams*, 115 F.3d at 662 (citing *The Supreme Court, 1990 Term-Leading Cases*, 105 Harv. L. Rev. 177, 398 (1991), stating "When constitutional rights are implicated . . . , the balance of values shifts against agency interpretation."). Petitioner submits that the issues presented in the LSRs resulting in denial of individual rights require no technical expertise. Although the agency is authorized with foreign policy expertise, the judiciary is charged exclusively with responsibility for

protecting constitutional rights. OFAC has completely stepped over this line in not only its forced interpretation of § 550.304 and overbroad construction of the IEEPA, but also with regard to its application of the SDN List "blacklist." Use of the SDN List as constructive notice to shift the burden to United States persons, rather than as fiat for selectively blocking personal property or for coercing foreign persons, seems the more reasoned interpretation.

As recognized in *Williams*, whether OFAC's interpretation is entitled to either *Chevron* or *Consarc* deference turns on the seriousness of the constitutional doubts its interpretation raises. As argued herein, whether the SDN "blacklist" constitutes a bill of attainder is alone sufficient to warrant a departure from *Chevron* or *Consarc*'s deference standard under *Williams*. Similarly, the fact that the LSRs impermissibly interfere with Petitioner's constitutional right of access-to-counsel unfettered by government interference also brings this case within *Williams*. Other constitutional issues that were argued to the District Court and the Fifth Circuit illustrate the severity of the constitutional issues raised by OFAC's interpretation:

- Whether naming Petitioner to the SDN List and applying the prohibitive measures of the LSRs, to block and destroy his property for prior legal conduct, operated as an *ex post facto* law in violation of the United States Constitution;

- Whether OFAC's decision to deny Petitioner's license request to exercise his private stock options to a blocked account was an unconstitutional taking in violation of the Fifth Amendment;

- Whether certain language in the LSRs as interpreted prohibiting legal services is unconstitutionally vague;

- Whether the standardless licensing scheme and inescapable result of SDN designation, without notice or a hearing, violates due process of law requirements.

In contrast to the Ninth Circuit in *Williams*, the Fifth Circuit opinion in this case rejected Petitioner's argument that the proper interpretation for applying the SDN List must avoid constitutional implications. Instead, the court below accorded OFAC's interpretation extreme deference under *Chevron* and *Consarc*. The split of the circuits resulting from the Fifth Circuit's decision should now be resolved by this Court.

IV.

THE DECISION OF THE FIFTH CIRCUIT PURPORTED TO DECIDE AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT: WHETHER OFAC'S INTERPRETATION OF THE IEEPA AND EXECUTIVE ORDERS EFFECTED AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER.

The decision below accorded OFAC "extreme deference" to its interpretation of the LSRs and the IEEPA. The court below accepted OFAC's broad construction of its authority from the IEEPA and Executive Orders to constitute an unrestricted delegation of power to extend to foreign individuals who even are "suspected of being actors directly or indirectly on behalf of the Government of Libya." [App. A at 6a]. The court below thus granted OFAC its assumed authority to use the SDN List and apply the LSRs to the liberty and property of any nationals of any country. Whether OFAC's usurpation of complete power over the non-Government-of-Libya-related activities and property of Petitioner is an extension of a proper construction of the IEEPA and Executive Orders should be resolved by the Court.

This Court's long standing federal law requiring an agency's power to be confined to its delegated authority, *Ruiz v. Morton*, 462 F.2d 818 (9th Cir. 1972), *aff'd*, 415 U.S. 199, 94 S. Ct. 1055 (1974), should be applied to examine the economic sanctions imposed, as they might apply to Petitioner and non-Libyan nationals. The use of "blacklists" to impose penalties on foreign persons presents an important federal question of whether such authority was delegated to OFAC.

In the last ten years, the Executive has dramatically increased its exercise of foreign policy enforcement through complex sanction regulations, promulgated with varying degrees of application and distinctions for each country targeted. The IEEPA authorized the Executive to promulgate against "any foreign country or its nationals" economic sanctions, which "may only be exercised to deal with an unusual and extraordinary threat . . . and may not be exercised for any other purpose." 50 U.S.C. § 1701(b). While the Cuban regulations blocked the property of both the country of Cuba and its nationals, 31 C.F.R. § 515.305, the LSRs only blocked the property of the Government of Libya and not its nationals. Neither the Executive nor Congress have legislated to prohibit or punish any person in other countries from continuing to engage in business with the targeted Government of Libya, nor have they prohibited United States persons from doing business with such persons. The LSRs did not advise Petitioner that lawfully continuing to work for his employer would result in the blocking of his property. OFAC has circumvented the need for such law by construing its power to selectively name foreign persons, nationals of other countries, who may work with the Government of Libya. Thus, OFAC effectively promulgates a new sanction law with each person whom OFAC decides to name as an SDN. Petitioner questions whether this was an intended delegation of power to OFAC.

A recent opinion of the District of Columbia Court of Appeals examined this additional basis for this Court to grant the Petition. In *American Trucking Assoc., Inc. v. United States Environmental Protection Agency*, No. 97-1440, 1999 WL 300618 (D.C. Cir. May 14, 1999), the Court determined that the Environmental Protection Agency ("EPA") effected an unconstitutional delegation of legislative power by failing to articulate intelligible principles relating to air quality. *Id.* at *2. *American Trucking* applied the non-delegation doctrine to require an agency's construction of its powers to provide "intelligible principles" by which its interpretation can be measured. *American Trucking* reasoned "[i]f the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily." *Id.* at *6.

Ruiz v. Morton held that an administrative agency "has no power to create a rule or regulation that is out of harmony with the statutory grant of its authority." *Ruiz*, 462 F.2d at 822. Although the Fifth Circuit did adhere to *Ruiz v. Morton* in an earlier sanction case, *Real v. Simon*, 510 F.2d 557, 564, *reh'g denied* 514 F.2d 738 (5th Cir. 1975), the Fifth Circuit in Petitioner's case, twenty-four years later, allowed the deference rules of *Chevron* and *Consarc* to override consideration of the plain words of limitation in IEEPA and judicially recognized blocking purposes (which purposes are referenced in Issue I, *supra*).

This Petition should be granted to allow this Court to compare the actual grant of authority to OFAC's construction of its authority, which is that OFAC holds unfettered discretion to exercise sanctions over foreign persons like Mr. Paradissiotis. OFAC's power once exercised over non-Libyan nationals is inescapable, except by a license. Petitioner considers the grant of authority to be inconsistent, *inter alia*:

- The IEEPA empowers the Executive, in the event of an unusual threat, to sanction "any country and nationals thereof";

- Executive Orders name the Government of Libya as the only country threat;

- The LSRs published do not sanction foreign person who may outside United States jurisdiction continue business with the Government of Libya; and

- Judicial purposes recognized for the Executive to implement blocking should frame the authority granted.

OFAC's licensing scheme lacks any "intelligible principles" by which Petitioner can navigate the LSR minefield. The arbitrary licensing scheme allows OFAC unfettered discretion in applying the LSRs.

American Trucking recognized that special conditions may justify "an exceptionally relaxed application of the non-delegation doctrine . . . such as the war powers of the President." *Id.* at *5. Maybe some of OFAC's actions are within such "an exceptional relaxed application." Maybe the foreign policy powers of the Executive dictate relaxed standards. Petitioner asks for this Court to establish some standards. The issue that now confronts this Court is whether the foreign policy powers of the Executive permit such a relaxed application of the non-delegation doctrine that Petitioner's right of access-to-counsel, right to be free *ex post facto* laws, and right to be free from bills of attainder may be arbitrarily constrained by OFAC.

This important constitutional issue should now be determined by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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